No. 18-15

IN THE

# Supreme Court of the United States

JAMES L. KISOR,

*Petitioner,*

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF OF PROFESSORS— DEAN RONALD A. CASS, CHRISTOPHER C. DEMUTH, SR., AND JAMES L. HUFFMAN—AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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January 31, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are teachers, scholars, and former government officials who have served in a variety of positions in the United States government, including positions

[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

in the Executive Office of the President, executive departments, independent agencies, and the judicial branch. *Amici* have been responsible for making decisions similar to that at issue in this proceeding and for reviewing agency decisions. They also, among other things, have been deeply engaged with organizations devoted to administrative law and related subjects, and have taught classes and written numerous articles and books on matters implicated in the question presented in this case. This brief reflects *amici*'s longstanding interests in the subject of administrative law and particularly standards for judicial review of administrative action.

## SUMMARY OF ARGUMENT

The rule of deference articulated first in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (*Seminole Rock*) and restated in *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (*Auer*), contradicts governing law, conflicts with the rationale for deference associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), and generates serious potential problems with constitutional structure and due process guarantees. Application of the deference rule in *Auer* also differs significantly from that in *Seminole Rock*, exacerbating problems with the rule and further undermining any arguable basis for its retention. Although this Court's decision in *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166–69 (2012) (*Christopher*), limits some of the ill effects of *Auer* deference, it does not cure its essential problems.

The basic understanding for statutory grants of review authority and for the majority of this Court's decisions respecting review of administrative actions is that courts interpret law (including the statutes

that authorize administrative action and legally meaningful rules adopted in implementing the law) but defer to administrators to the extent that they are acting pursuant to a legal commitment of discretionary authority. See, e.g., Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (1989). The legal rule, in other words, is that *deference is the corollary of delegated discretion*. When laws grant agencies deference within some space to articulate the policies that, in the agency's view, best implement a statutory directive—whether the agency explains those policies in some measure in terms of their fit with particular statutory language or in terms of other rationales that by law are within the agency's purview—courts should defer to agency decisions that are within that discretionary space.

Despite disagreements on the exact nature of and terms for determining the scope of legally delegated discretion, there is broad agreement that courts have the authority and obligation "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), including the law's parameters of delegated discretion. That has been accepted doctrine for more than two centuries; it is embodied, among other places, in the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§701–706 (APA), which clearly gives courts reviewing agency actions the duty to interpret law—including agency regulations—but limits review to the extent precluded by law or committed to agency discretion by law. Courts, not agencies, are plainly empowered to determine how far that commitment of discretion extends.

This understanding of the division of authority between courts and agencies also was the predicate for *Chevron* deference. See, e.g., *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–41 (1995). It is why the opinion in *Chevron* observed that courts are "the final authority on issues of statutory construction," and are expected to use "traditional tools of statutory construction" to interpret statutory directives. *Chevron*, 467 U.S. at 843 n.9. At the same time, when a court determines that, explicitly or implicitly, a law commits a matter to agency discretion (including the exercise of policy judgment on the best mode for implementation of statutory terms), courts defer to the agency's decision.

Even though this understanding of the basic law of judicial review often is characterized as mandating deference on the *interpretation* of the governing *law*, the better way to appreciate *Chevron* deference is as judicial recognition of discretion to make decisions on *policy* matters respecting *implementation* of law within a statutorily-sanctioned range of discretionary decisions. See, e.g., Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294, 1314–15 (2015) (*Rethinking*); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 836 (2001); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 Colum. L. Rev. 1143, 1145–50 (2012). That is why deference generally does not preclude review to assure reasonableness of agency action; deference extends to agency decisions so far—but *only* so far—as the governing law (interpreted by courts) commands. See, e.g., *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 239, 242 (2004); *Barnhart v. Walton*, 535 U.S. 212, 218–20 (2002); *Chevron*, 467 U.S. at 842–43.

Agencies often articulate policy decisions in terms of their consistency with governing law; but the agency's mandate is implementation, not interpretation, and judicial deference only recognizes lawful exercises of discretion within the parameters of courts' reading of the law.

In keeping with that understanding, if the law grants an agency expansive discretion over *both* rule articulation and rule interpretation in respect of a given matter, courts should defer accordingly to the agency's exercises of both sorts of discretionary authority. A law could, in other words, create a space within which agencies are free to act without judicial oversight, not merely in setting a general rule or policy but also in subsequently elaborating the meaning of the rule or policy in an interpretive document or in an action applying the rule or policy. See, e.g., *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–98 (1991); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 151 (1991). Specific constitutional provisions set limits on congressional power to grant such discretion, but so long as none of these provisions is breached, agencies may enjoy freedom from judicial review of some dimension over both general policy-making and specific actions implementing agency policies and priorities. See, e.g., *Webster v. Doe*, 486 U.S. 592 (1988) (*Webster*); *Heckler v. Chaney*, 470 U.S. 821 (1985) (*Chaney*).

However, *there is no basis for according additional discretion to an agency simply because the agency adopts an ambiguous rule*, as the test used in *Auer* does. Deference recognizes discretionary authority conferred by law. Unlike ambiguity in a statute—which in some settings might indicate a legal commitment of discretion to an agency—there is *no power in*

*an agency to confer additional authority on itself*. That is as true of the agency acting by indirect means as by a clear statement asserting its additional authority.

A "matryoshka doll" (Russian nesting doll) approach to delegation of power—allowing successive waves of deference from unclear statutes and rules, one after another—has no basis in law. The broad rule of deference to agency self-interpretation embraced in *Auer* is not found in the APA or in the law preceding the APA. See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908, 924–27, 989–90 (2017) (*Origins*); Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531, 537–38, 566–79 (2018) (Auer *Deference*); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo. J.L. & Pub. Pol'y 103, 105–10 (2018) (*Review*).

Further, *Auer* is not consistent with the approach to rule analysis used by this Court in *Seminole Rock* itself, the case principally relied on in *Auer*. In fact, the contrast between *Seminole Rock* and *Auer* illustrates why the rule announced in *Auer* should be clearly and unambiguously renounced. In reaching its decision in *Seminole Rock*, this Court gave ample indication that it *did not defer* to the Administrator of the Office of Price Administration (OPA) in determining the meaning of the regulation at issue. See Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, Notice & Comment (Sept. 12, 2016), available at http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/ [https://perma.cc/CLR4-DTWQ] (*Hart's Brief*); Michael P. Healy, *The Past, Present and Future of* Auer *Deference* Mead, *Form and Function*

*in Judicial Review of Agency Interpretations of Regulations*, 62 Kansas L. Rev. 633, 637–40 (2014). The Court's opinion repeatedly emphasized ways in which the Administrator's interpretation matched the justices' view of the proper reading of the rule, hardly the hallmark of judicial deference. See *Seminole Rock*, 325 U.S. at 415–18.

Even if the justices in *Seminole Rock* did defer to the Administrator, in keeping with the statement of deference in the opinion of the Court, that deference would have been defensible on the same grounds as *Chevron* deference—not because deference based on regulation is analogous to deference based on statutory authorization but because the OPA's interpretation was articulated simultaneously with the adoption of its rule and was published along with the rule *at the time*. See *Seminole Rock*, 325 U.S. at 417. The agency not only interpreted the rule consistently but essentially did everything that would have been done if the interpretation were part of the rule itself. See Cass, Auer *Deference*, *supra* at 549–50. So far as OPA had discretion to adopt rules implementing relevant provisions of the Emergency Price Control Act of 1942, Pub. L. 77-421, 56 Stat. 23, that discretion logically could have extended to the interpretation at issue in *Seminole Rock*.

The facts of *Auer*, and the implications of extending discretion to the agency's position in that case, stand in stark contrast. The Department of Labor rule at issue in *Auer*, implementing a provision of the Fair Labor Standards Act (FLSA), became effective in 1973, was amended in 1975, and was only interpreted by the Secretary of Labor more than two decades later in an *amicus* brief filed at this Court's request in the *Auer* case—the very case that gave deference to the

Department's rule interpretation. This Court emphasized that the Department's interpretation was reasonable, *Auer*, 519 U.S. at 461–62, certainly a basis for *agreement* with that interpretation, but there was no finding respecting any matter that might have supported *deference* to it. The Court did not find that the law granted expansive discretion to the Secretary over interpretation of the provision at issue, that the matter at issue was one traditionally within the prerogative of the Executive branch, or that the matter was constitutionally assigned to Executive authority. These factors might provide bases for finding a legal commitment of expanded discretionary authority. See, e.g., *Chaney*, 470 U.S. at 830–35.

However, permitting the exercise of such authority over interpretation of legally binding rules carries risks even in those contexts. Two risks in particular have been emphasized.

First, permitting an agency expansive leeway to interpret and apply an unclear rule risks unfair surprise in its application of the rule to persons having no reasonable opportunity to anticipate the agency's action. See, e.g., *Christopher*, 132 S.Ct. at 2167; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007); *Martin*, 499 U.S. at 157 (1991). Second, deference to agency interpretations of unclear rules may encourage strategic behavior, intentionally reducing rule clarity in some instances to preserve agency flexibility. See, e.g., *Christopher*, 132 S.Ct. at 2168; *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

Although some scholars have found these risks sufficient to preclude deference to *any* agency rule interpretation, see, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 659–60, 664–69 (1996), the risks are not demonstrably present in *all* instances of agency rule interpretation. Moreover, granting deference only to the extent of actual delegated discretion both reduces those risks and limits them to circumstances in which enacted law conveys lawmakers' determinations that the risks in those specific settings are outweighed by benefits from granting that discretion. See, e.g., Cass, Auer *Deference*, *supra* at 567–80; Aaron L. Nielson, *Beyond* Seminole Rock, 105 Geo. L.J. 943, 989–1000 (2017) (*Beyond*); Walker, *Review*, *supra* at 1007–10. The deference appropriate on this view is not a *general* deference to interpretation of ambiguous rules, rooted in the rule ambiguity itself, but deference to *a particular exercise of discretion committed by law*.

The exact showing that is required to demonstrate that commitment need not be encapsulated in a single test. There are sound reasons for requiring relatively explicit commitment of discretion in some cases, see, e.g., *King v. Burwell*, 135 S.Ct. 2480, 2488–89 (2015); *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468–71 (2001) (*American Trucking Associations*); *Food and Drug Administration v. Brown & Williamson*, 529 U.S. 120, 159–60 (2000) (*Brown & Williamson*); *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994) (*MCI Telecommunications*), and in other instances for permitting that commitment to be inferred from the nature of the authority granted to an agency and the broader statutory structure containing the commitment of authority, see, e.g., *National*

*Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981, 989 (2005); *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. at 830–35. At a minimum, however, similar evidence of legislative commitment of discretionary authority should be required for deference to the interpretation and application of rules as for establishing the scope of discretionary agency authority in adopting them. That manifestly is not the rule announced in *Auer*.

We urge the Court to overrule the deference test embraced in *Auer* and to limit deference associated with *Seminole Rock* to instances in which applicable law grants discretion to an agency over the interpretation of the agency's regulation.

## ARGUMENT

### I. Deference to Agency Decisions Depends on Legal Commitment of Discretionary Authority.

#### A. Both the APA and *Chevron* Make Judicial Review Standards Dependent on Statutorily-Granted Discretion.

Although judicial deference to administrative determinations varies with the context and nature of the determination, deference uniformly requires legal commitment of discretionary authority to the agency in respect of the decision at issue. The deference rule announced in *Auer*, 519 U.S. at 461, mandating acceptance of an agency interpretation of its rules unless "plainly erroneous or inconsistent with the regulation," should be evaluated in relation to the underlying instructions in the APA's provisions for judicial review, 5 U.S.C. §§ 701, 706, as well as concepts associated with *Chevron*.

### 1. The Administrative Procedure Act Mandates Judicial Decision on Interpretation of Law Unless Review Is Precluded or Committed to Agency Discretion by Law.

The Administrative Procedure Act (APA), setting out the general rules governing judicial review of administrative action, directs reviewing courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and *determine the meaning or applicability of the terms of an agency action*," 5 U.S.C. § 701 (emphasis added), but excepts review "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 706. It also directs that courts are to "hold unlawful and set aside agency actions . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C), as well as actions the court finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Consistent with prior practice, the text plainly assigns the law-interpreting function to reviewing courts while directing the courts to respect the degree of discretion given to agencies, checking exercises of discretion for various forms of unreasonableness, rather than of correctness (except for instances in which law precludes review even of that limited sort). See, e.g., Cass, *Rethinking*, *supra* at 1311–14.

The degree of discretion given to an agency is not always expressly stated in the governing statutory text. The understanding, both pre- and post-APA, has been that *some* commitments of broad authority to an agency embody grants of discretion and that the breadth and ambiguity of the terms of a legal authorization for administrative action may evidence that

meaning.[2] See, e.g., *National Labor Relations Bd. v. Hearst Publications, Inc.*, 322 U.S. 111 (1943); *Gray v. Powell*, 314 U.S. 402 (1941); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); Ronald A. Cass, Colin S. Diver, Jack M. Beermann & Jody Freeman, Administrative Law: Cases & Materials 154–58, 166–70 (7th ed. 2016); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992). So, for example, the Communications Act of 1934's assignment to the Federal Communications Commission (FCC) of authority to allocate and license radio stations in ways that serve "the public interest, convenience, and necessity," 47 U.S.C. §§ 307, 309, necessarily conveys discretionary authority. See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Having framed the agency's authority in obviously broad fashion, Congress did not need to add "and the FCC has discretion to decide what 'the public interest, convenience, and necessity' means" at least within some domain. The law plainly lets the Commission choose among a variety of criteria for allocating broadcast licenses, but equally plainly would not permit the Commissioners to give prefer-

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[2] The evidence of legislative commitment of discretion does not, of course, resolve the question whether the degree and nature of the discretion accorded violate strictures on delegation of legislative power. See, e.g., *Loving v. United States*, 517 U.S. 748, 757–58 (1996); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035, 1042–43 (2007); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147, 151–61, 177 (2016) (*Delegation Reconsidered*); Gary S. Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 335–53 (2002) (*Delegation*); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015).

ence first to their own relatives and friends. While the FCC enjoys discretion to make policy choices implementing the broad statutory directive, decision on the degree of discretion accorded and on the location of its outer bounds remains a question of law for judicial disposition.

### 2. The *Chevron* Decision Does Not Change Scope-of-Review Requirements of the Administrative Procedure Act and Related Law.

That same understanding informed the Court's decision in *Chevron*. As this Court later explained:

> We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

*Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. at 735, 740–41 (1995).

*Chevron* was *not* intended as a free-standing new test but instead as a guide to interpreting the scope of discretion granted to agencies and the legally appropriate deference that discretion conveyed.[3] See, e.g., Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 Nw. L. Rev. 551, 554 (2012) (*Puzzle*).

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[3] Although the relevant judicial review provision for *Chevron* was contained in the Clean Air Act Amendments of 1977, 42 U.S.C. 7607(b)(9), rather than the APA, that provision restated almost verbatim APA § 706.

Although *Chevron* often is characterized as demanding judicial deference on the *interpretation* of the governing *law*, it is more accurate to say that *Chevron* addresses the discretion for administrative officials to make decisions on *policy* matters respecting *implementation* of law within a statutorily-sanctioned range of discretionary decisions. See, e.g., Cass, *Rethinking*, *supra* at 1314–15; Merrill & Hickman, *supra* at 836, 863–64, 870–72; Strauss, *supra* at 1145–50. That is why the opinion in *Chevron* observed that courts are "the final authority on issues of statutory construction," and are expected to use "traditional tools of statutory construction" to interpret statutory directives. *Chevron*, 467 U.S. at 843 n.9. That also is why deference generally does not preclude review to assure reasonableness of agency action, as deference extends to agency decisions so far—but *only* so far—as the governing law (interpreted by courts) commands. See, e.g., *Household Credit Services, Inc. v. Pfennig*, 541 U.S. at 239, 242; *Barnhart v. Walton*, 535 U.S. at 218–20; *Chevron*, 467 U.S. at 842–43.

Hence, *Chevron* itself did not reverse the long-held understanding that *courts* have the obligation, when their jurisdiction is properly invoked, "to say what the law is," *Marbury v. Madison*, 5 U.S. at 177. *Chevron* did not contradict the general directive for courts hearing challenges to agency action to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," APA, at 5 U.S.C. § 706, and to reverse any action found by a reviewing court to be "not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction,

authority, or limitations, or short of statutory right." *Id.*, at § 706(2)(1)–(3).[4]

### B. *Chevron* Deference Has Been Denied Where Indicia of Discretionary Authority Are Absent.

Judges and scholars have offered different explanations for the manner in which courts do and should evaluate the scope of administrators' discretion. Then-judge Stephen Breyer, for example, said that courts "have looked to practical features of the particular circumstance to decide whether it 'makes sense,' in terms of the need for fair and efficient administration of that statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation." Breyer, *supra* at 370. Justice Scalia, quoting from two court of appeals decisions, stated his approach this way:

> The extent to which courts should defer to agency interpretations of law is ultimately "'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.'"

Scalia, *supra* at 516 (quoting *Process Gas Consumers Group v. United States Department of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (*en banc*), quoting *Constance v. Secretary of Health & Human Services*,

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[4] As relevant to *Chevron*, the same directive is codified at 42 U.S.C. 7607(b)(9)(A)–(C). Saying that the decision in *Chevron* is based in a finding of legislative delegation of discretionary authority, of course, does not elide questions about the strength of the evidence used by the Court to make that finding or the manner in which the reasonableness of an agency's exercise of that authority is addressed. See, e.g., Merrill & Hickman, *supra* at 833–34.

672 F.2d 990, 995 (1st Cir. 1982), *cert. denied*, 461 U.S. 905 (1983)).

Despite differences in approach, the common ground for granting deference is a conclusion that the law, explicitly or implicitly, grants discretion to a given administrative official to make a particular determination within bounds set by the relevant statute. Consistent with that understanding, *Chevron*'s "Step One" determines the room for discretion under law, see, e.g., *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987); *Chevron*, 467 U.S. at 843 n.9, while its second step assesses whether the agency has reasonably exercised that discretion, see, e.g., *Household Credit Services., Inc. v. Pfennig*, 541 U.S. at 239, 242; *Barnhart v. Walton*, 535 U.S. at 218–20; *Chevron*, 467 U.S. at 842–43.

The Court has made clear that decision on the scope of discretion left to an agency, as well as the terms of commitment of authority to an agency more generally, depends on evidence respecting statutory meaning in particular settings. See, e.g., *King v. Burwell*, 135 S.Ct. at 2488–89; *Brown & Williamson*, 529 U.S. at 159. At times, the judgment respecting the scope of authority left to an agency has turned on the consistency of a commitment of discretion to the broader statutory framework. See, e.g., *King v. Burwell*, 135 S.Ct. at 2488–89; *American Trucking Associations*, 531 U.S. at 468–71; *Brown & Williamson*, 529 U.S. at 159–60; *MCI Telecommunications*, 512 U.S. at 231. In other cases, this Court has looked to additional factors to determine the degree of discretion granted to particular agency decisions and, consequently, the deference due to them. See, e.g., *United States v. Mead*

*Corp.*, 533 U.S. 218, 229–31, 236 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Although the cases do not uniformly find a single controlling factor for determining the scope of agency authority, the linchpin for *Chevron* analysis, as for the APA and prior law, remains determining the scope of legally conferred discretion, either expressly committed by statute or fairly inferred from the law—as scholars across the spectrum of views on administrative law have explained. See, e.g., Cass, *Rethinking*, *supra* at 1313; Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 Chi.-Kent L. Rev. 1377, 1379 (1997) (*Reconceptualizing*); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1257 (1997); Merrill & Hickman, *supra* at 872; Merrill, *Puzzle*, *supra* at 554; Strauss, *supra* at 1145, 1147, 1158–61, 1163.

## II. A General Rule of Deference to Agency Interpretation of Rule Ambiguity Is Contrary to Law, Pre-*Auer* Precedent, and Constitutional Structure.

### A. Deference to Agency Rule Interpretation Is Appropriate Only for Decisions Clearly Committed to Agency Discretion by Law; It Should Not Be Predicated on Rule Ambiguity.

#### 1. Deference Follows Legally Authorized Discretion Both for Rules and for Specific Decisions.

The law on standards of judicial review makes clear that deference is the corollary of legally committed discretion. In keeping with that understanding, if the law grants an agency expansive discretion over

*both* rule articulation and rule interpretation on a particular matter, courts should defer to the agency's exercises of both types of discretionary authority. That has been the path followed by this Court when it has found that laws granted an agency discretion to act without judicial oversight to some extent in setting a general rule or policy and also in elaborating the meaning of the rule or policy. See, e.g., *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. at 696–98; *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. at 151.

Specific constitutional provisions set limits on congressional power to grant such discretion, but so long as none of these provisions is breached, agencies may enjoy broad or narrow freedom from judicial review of both general policy-making and specific actions implementing agency policies and priorities. See, e.g., *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. 830–35. Consider, for example, Section 102(c) of the National Security Act of 1947, which states that "the Director of Central Intelligence may, in the discretion of the Director, terminate the employment of any officer or employee of the Central Intelligence Agency whenever the Director deems the termination of employment of such officer or employee necessary or advisable in the interests of the United States." 50 U.S.C. § 3036(e)(1). The deference owed to such an exercise of legally granted discretionary authority follows from the APA's limitation of review where a matter is "committed to agency discretion by law." *Webster*, 486 U.S. at 600. The conclusion should be no different if the Director acts through adopting a rule and then implementing the rule or through making relevant determinations on policy and application in a particular decision. See, e.g., Nielson, *Beyond*, *supra* at 964–79 (exploring relation of rulemaking and adju-

dication in effectuating agency policy); Matthew Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449, 1470–71, 1491–94 (2011) (same).

### 2. An Agency Action Cannot Expand the Scope of Legally Sanctioned Discretionary Authority for the Agency and Cannot Limit the Scope of Judicial Review.

However, *there is no basis for according additional deference to an agency simply because the agency adopts an ambiguous rule*, as the rule restated in *Auer* does. Deference recognizes discretionary authority. Unlike ambiguity in a statute—which in some settings might indicate a commitment of discretion to an agency—there is no power in an agency to confer additional discretionary authority on itself and no reason to infer such additional discretion from adoption of a rule that admits of various interpretations that are not "plainly erroneous or inconsistent with the regulation," *Auer*, 519 U.S. at 461.

If such self-delegation were possible and were to be found merely in a regulation's ambiguity, what sort of limiting principle would constrain that power? Would an ambiguous agency interpretation of its own general rule confer broader discretion over the rule's application, beyond the discretion "created" by the rule's own ambiguity? A "matryoshka doll" (Russian nesting doll) approach to delegation of power—allowing a cascade of successive waves of deference (implying a cascade of successive waves of delegated discretion) from unclear statutes or rules—would open the door to empowering agencies, not Congress, to dictate how much or how little scrutiny courts can give to their decisions.

To test the logic of allowing that result, imagine an agency declaring, in the context of adopting a rule, that it would enjoy expansive authority to interpret the rule in the future. It is inconceivable that this Court would credit such a declaration. While an agency may receive deference for exercising delegated discretion, the power to decide how much discretion to repose in the agency rests strictly with the lawmaking branches acting through constitutionally prescribed means.[5]

Nothing in this Court's jurisprudence or in the law supports a contrary result. Except for the one statement in *Seminole Rock*, the broad rule of deference to agency self-interpretation embraced in *Auer* is not found in the APA or in the law or decisions of this Court preceding the APA. See, e.g., Bamzai, *Origins*, *supra* at 908, 924–27, 989–90; Cass, Auer *Deference*, *supra* at 537–38, 566–79; Walker, *Review*, *supra* at 105–10.

### 3. A Broad Rule of Deference Is Not Supported by this Court's Decision in *Seminole Rock*.

Further, notwithstanding the statement of the general rule of deference to agency interpretation of rules in *Seminole Rock*, *Auer* is not consistent with the approach to rule analysis in *Seminole Rock* itself, the

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[5] As already noted, this authority must be exercised within the bounds of constitutional constraints on who can discharge the powers and duties legally assigned, see, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986), how they can be carried out, see, e.g., *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), and what duties can be assigned, see, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

case principally relied on in *Auer*.[6] In fact, the contrast between *Seminole Rock* and *Auer* illustrates why the rule announced in *Auer* should be clearly and unambiguously renounced.

In reaching its decision in *Seminole Rock*, this Court gave ample indication that it *did not defer* to the Administrator of the Office of Price Administration in determining the meaning of the regulation at issue. See Bamzai, *Hart's Brief, supra*; Cass, Auer *Deference*, *supra* at 548–49; Healy, *supra* at 637–40. The Court's opinion repeatedly emphasized ways in which the OPA interpretation matched the justices' view of the proper reading of the rule, hardly the hallmark of judicial deference. See *Seminole Rock*, 325 U.S. at 415–18. The case turned on which of several methods for determining the relevant price comparator, under the rule for assessing consistency with the mandated price freeze, applied to the particular contracts at issue. The Court's opinion declared, among other things, that "*[a]s we read the regulation* . . . [the method chosen by OPA] *clearly applies* to the facts of this case," *id.* at 415 (emphasis added), and further stated "*[o]ur reading*

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[6] The only other citation supporting *Auer*'s conclusion that the courts must defer to an agency's interpretation of its own rule unless "plainly erroneous or inconsistent with the regulation" was *Robertson v. Methow*, 490 U.S. 332, 359 (1989) (*Robertson*), which the *Auer* decision cited for its quotation of *Seminole Rock*. See *Auer*, 519 U.S. at 461. *Robertson*, after dealing extensively with questions relating to interpretation of the *statutory* requirements placed on agencies in respect of environmental evaluations by the National Environmental Protection Act (NEPA), 83 Stat. 852, 42 U.S.C. § 4231 et seq., briefly addresses the contention that the Forest Service violated its own regulations. The Court concluded that the agency had acted reasonably in choosing how to implement its obligations under relevant statutory provisions and its own rules. See *Robertson*, 490 U.S. at 357–59.

of the language . . . [at issue] . . . *compel[s]* the conclusion" reached by OPA respecting the meaning of the rule, *id.* at 418 (emphasis added) (footnote omitted).

The contradiction between the opinion itself and the rule for which *Seminole Rock* is known, quoted in *Auer*, is captured in Professor Healy's observation that this "rule of deference did not determine the result in the case. The Court itself construed the regulation and found that it provided a clear answer to the legal question." Healy, *supra* at 639. See also Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47, 60 (2015); Manning, *supra* at 619 (1996); Stephenson & Pogoriler, *supra* at 1454.

Even if the justices in *Seminole Rock* did defer to OPA, in keeping with the statement of deference in the opinion of the Court, deference would have been defensible on essentially the same grounds as those supporting *Chevron* deference. If the law being implemented (the Emergency Price Control Act of 1942) granted OPA discretion to select among possible approaches to freezing prices during war-time, the agency's interpretation of its rule would stand on the same ground because that interpretation was articulated simultaneously with the adoption of the rule and was published along with the rule *at the same time*. See *Seminole Rock*, 325 U.S. at 417. The agency not only interpreted the rule consistently but essentially did everything that would have been done if the interpretation were part of the rule itself. See Cass, Auer *Deference*, *supra* at 549–50. To the extent deference should have been accorded to OPA policy decisions on implementing the law (via regulation), the same deference would apply *in this context* to the OPA's explanation of its regulation. *Seminole Rock*,

thus, cannot provide a precedent for a general canon of deference to agency interpretation of its own rules.

#### 4. *Auer*'s Deference Unlawfully Expands the Deference Previously Accorded to Agency Rule Interpretations.

The facts of *Auer*, and the implications of extending discretion to the agency's position in that case, stand in stark contrast to *Seminole Rock*. The Department of Labor rule at issue in *Auer*, implementing a provision of the Fair Labor Standards Act (FLSA)—exempting executive, administrative, or professional employees from overtime pay requirements under the Act—became effective in 1973, was amended in 1975, and was only interpreted by the Secretary of Labor more than two decades later in an *amicus* brief filed at this Court's request in the *Auer* case—the very case that gave deference to the Department's rule interpretation.

This Court concluded that the Department's interpretation of the rule at issue was reasonable after comparing the Department's construction of the critical phrase being construed ("subject to") with dictionary definitions of that phrase and evaluating the application of the Department's interpretation. *Auer*, 519 U.S. at 461–62. It is not clear whether, without deference, the Court would have reached the same conclusion respecting the regulation's meaning, but taking the opinion on its own terms, *Auer* accorded deference without critical inquiry into the scope of discretion conferred on the Department of Labor under the FLSA. The opinion's sole statement that the law gave the Department broad discretion to decide how to implement the law's underlying provision, *Auer*, 519 U.S. at 456, did not explain why this constituted a statutory commitment of discretionary authority over both the *initial articulation of a rule* for assessing the

exemption's operation and *subsequent interpretation of that rule*. Nor did the Court find that the matter at issue was traditionally within the prerogative of the Executive branch, or that the matter was constitutionally assigned to Executive authority—questions addressed in cases such as *Webster* and *Chaney*. See *Auer*, 519 U.S. at 461–63. Notably, in a subsequent case challenging the Department's interpretation of regulations under the FLSA, the Court unanimously declined to accord the same deference granted in *Auer*. See *Christopher*, 132 S.Ct. at 2167–73; *id.* at 2175 (Breyer, J., dissenting, on other grounds).

The *Auer* Court rejected objections that the interpretation was first advanced in a brief in the case in which it was being applied, largely because the Department was not a party to the case and, therefore, could not be accused of unfairly surprising affected parties to advance its own litigating interests. *Auer*, 519 U.S. at 462. Yet the decision did not recognize that the interpretation of the rule, more than twenty years after its adoption, could alter settled expectations even if the Department's reading of the rule did not advance its own immediate litigation interests. In particular, the Court did not acknowledge that adopting one interpretation among a set of plausible possibilities without employing procedures that accord greater notice to those affected could work exactly the sort of unfair surprise criticized elsewhere. See, e.g., Stephenson & Pogoriler, *supra* at 1451–52, 1484–96.

### B. *Auer* Deference Risks Violation of Due Process Guarantees through Unfair Surprise in Rule Application and Strategic Behavior in Rule Design.

Although a legal commitment of expanded discretionary authority could command deference, administrative

discretion over interpretation of legally binding rules carries risks even in settings where that authority exists.

Two risks in particular have been stressed. First, permitting an agency expansive leeway to interpret and apply an unclear rule risks unfair surprise in application of the rule to persons having no reasonable opportunity to anticipate the agency's action. See, e.g., *Christopher*, 132 S.Ct. at 2167; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. at 170–71; *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. at 157. This risk is in tension with due process requirements respecting notice of legally binding rules. See, e.g., *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). While the demand for rule clarity is most often articulated when criminal punishment is involved, concerns for fairness, notice, and legality are relevant in a far broader set of contexts. See, e.g., *Federal Communications Commission v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2318 (2012).

A second risk of *Auer* deference is that crediting agency interpretations of unclear rules may encourage strategic behavior, reducing rule clarity in some instances in order to preserve agency flexibility. See, e.g., *Christopher*, 132 S.Ct. at 2168; *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. at 69 (Scalia, J., concurring); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. at 525 (Thomas, J., dissenting). As Justice Scalia put the point:

> [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability pur-

> poses of rulemaking and promotes arbitrary government.

*Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. at 69 (Scalia, J., concurring). See also Walker, *Review*, *supra* at 4–5.

Both of these are serious risks, although each may be overstated. While some scholars have found these risks sufficient to preclude deference to *any* agency rule interpretation, see, e.g., Manning, *supra* at 659–60, 664–69, the risks are not demonstrably present in *all* instances of agency rule interpretation. Professor (now Dean) Manning postulated that allowing a rule writer to decide on the rule's meaning inevitably violates the imperative (embedded in the Due Process Clauses) of an impartial adjudicator. See Manning, *supra* at 631–54. He concludes that any deference in that context is unconstitutional. *Id.* at 654–57.

So far as the concern is *biased* rule interpretation, this conclusion is overbroad. See Cass, Auer *Deference*, *supra* at 561–63. For example, the issues in *Seminole Rock*—which among the alternative methods for calculation of the price comparator was appropriate for the crushed stone contracts being evaluated and how the spacing of sales and delivery of the stone fit OPA's rule—were "narrow, technical, and affected by experience associated with the work of the Office of Price Administration." *Id.* at 562. There "was no reason to expect the administrative decision makers to have a bias" on that question. *Id.* Similarly, the Director of the CIA's decisions on personnel matters (the question presented in *Webster*) would not be more likely to raise concerns of bias—and deference to his determination, thus, would not be more problematic—if the Director were interpreting his own rule on those decisions than if he were acting in specific matters

without a rule. These alternative means of proceeding are generally available to administrators. See, e.g., *Securities & Exchange Commission v. Chenery*, 332 U.S. 194, 203 (1947) (*Chenery II*); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1405 (2004); Nielson, *Beyond*, *supra* at 948; Glen O. Robinson, *Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485, 485–86 (1970).

Strategic behavior is a general concern with all decisions, but it is not universally a risk that seriously compromises the exercise of delegated authority. Professor Walker has found that administrators are generally aware of *Chevron* deference and take it into account to some degree in fashioning decisions, but they are less aware of *Auer* deference and less likely to consider it in rule design. See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1059–66 (2015). Further, politically-responsive officials may prefer to bind future decision-makers, rather than to adopt rules that expand their discretion. See, e.g., Cass, Auer *Deference*, *supra* at 564–65; Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 138–39 (2018). This does not eliminate concerns with strategic behavior, especially so far as long-term staff have the laboring oar in rule design, see, e.g., Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169, 185–87, 216–19 (1978), but it does temper the concerns.

### C. *Auer* Deference Undermines Constitutional Separation of Powers.

The more trenchant problem of *Auer* deference is that it grants a power to administrative agencies that undermines the constitutional structure of separated powers. The Constitution vests "all legislative powers"

granted in that document in the Congress and specifies the essential mechanisms for exercising the lawmaking power. U.S. Const., Article I, sec. 1, sec. 7. The judicial power is vested in a Supreme Court and inferior courts established under Article III's requirements for judges with life tenure and irreducible pay. U.S. Const., Article III, sec. 1.

The division of powers does not prohibit statutory grants of authority to executive agencies to make rules to guide the exercise of their powers in implementing the laws or to make adjudicative decisions in the exercise of those powers. However, it does prohibit exercises of lawmaking power—including exercises of power not denominated as formal lawmaking—outside of the prescribed form of bicameral concurrence and presentment, *Clinton v. City of New York*, 524 U.S. 417 (1998); *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), or of the judicial power outside of Article III courts, *Stern v. Marshall*, 564 U.S. 462 (2011); *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

While striking down those breaches of constitutional structure, this Court has permitted statutory assignments of authority that in our (and many other scholars') view constitute the lawmaking power that the Constitution commits exclusively to Congress. See generally Alexander & Prakash, *supra*; Cass, *Delegation Reconsidered*, *supra*; Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. Legal Analysis 121 (2016); Lawson, *Delegation*, *supra*; Rao, *supra*; David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 Am. U. L. Rev. 355 (1987).

These judicial decisions address authority that has been clearly, if improperly, assigned to other bodies through formally adopted law. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371–79 (1989); *Yakus v. United States*, 321 U.S. 414, 420–23 (1944). In other words, they represent acquiescence in the legislature's determination that a particular exercise of authority is properly reposed in a given government agency.

*Auer*'s general directive for courts to give conclusive effect to any administrative interpretation of a regulation that is not clearly erroneous or inconsistent differs from the typical case rejecting an unconstitutional-delegation complaint: *Auer* effectively grants power for agencies to make legally binding rules (and to give them conclusive effect) in contravention of the general statutory rule for review of agency decisions and without a finding that the discretion being exercised was actually delegated by law. See Cass, Auer *Deference*, *supra* at 579–80. While *Auer* formally deals with interpretation, not adoption, of agency rules, the process of interpreting rules that are ambiguous easily can become a vehicle for altering the rules' content. Appreciation of this problem supported this Court's decision that just as substantive rules with the force of law must be adopted through notice-and-comment proceedings, so, too, must such rules be amended through notice-and-comment proceedings. See, e.g., *Perez v. Mortgage Bankers Association*, 135 S.Ct. 1199, 1206 (2015) (*Mortgage Bankers Association*); *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox Television Stations*).

*Auer*'s acceptance of judicial deference without a considered finding of legal commitment to the agency of discretion over the matter being decided—over not

just one level of decision-making but over the second level of follow-on interpretation and application—stands in marked contrast to decisions like *Mortgage Bankers Association* and *Fox Television Stations*. Blurring the line between an initial grant of discretion over a particular approach to decisions—over a policy judgment—on the one hand, and decisions that construe the policy, on the other, makes it more difficult to maintain constitutional divisions between lawmaking and law-implementing functions.

Academic arguments in support of *Auer* often re-cast its rule to more closely accord with more focused judicial findings of legislative authorization. For example, Professors Sunstein and Vermeule defend a version of *Auer* that is narrower than the strong deference principle universally quoted from the case, borrowing emphasis instead from the majority decision in *City of Arlington v. Federal Communications Commission*, 133 S.Ct. 1863 (2013), on courts' role in constraining agency interpretations to fit the interpreted text. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297, 310–16 (2017). Certainly, to the extent courts exercise the sort of critical judgment about the extent of discretion that is permitted to an agency and assure that the agency has not strayed outside the bounds of its delegated discretion (as Professors Sunstein and Vermeule suppose), *Auer* deference would essentially collapse into the inquiries required by Section 706 of the APA and also would constrain the exercise of administrative judgment more closely to fit constitutional structure. Unfortunately, the tailored *Auer* rule that emerges in such academic writings is not the actual rule announced in the case.

The significant argument, both in cases and in academic debates, is over *how* to decide the scope of discretion an agency enjoys. *Chevron* states a general canon of judicial construction that permits courts to infer discretion from statutory ambiguity, with some exceptions. See *Chevron*, 467 U.S. at 843; see also *King v. Burwell*, 135 S.Ct. at 2488–89; *Brown & Williamson*, 529 U.S. at 159. *Auer*, taken at face value, states a general rule of deference to agency rule interpretations *without* requiring a clear statutory grant of discretionary authority or even a strong basis for inferring such a grant. See *Auer*, 519 U.S. at 461. As already noted, that departs from appreciation for the judicial role of independent determination on the extent of administrative discretion, which is common ground to a wide array of scholars. See, e.g., Cass, *Rethinking*, *supra* at 1313; Lawson, *Reconceptualizing*, *supra* at 1379; Levin, *supra* at 1257; Merrill & Hickman, *supra* at 872; Merrill, *Puzzle*, *supra* at 554.

*Auer*'s rule of deference should be replaced with an insistence that law fairly clearly evidence the commitment to the agency of the particular sort and level of discretion exercised. This would not wholly eliminate risks of unfair surprise and strategic behavior, but it would limit the exercises of discretion that are most likely to create those risks to circumstances in which enacted law conveys lawmakers' determinations that, in those specific settings, these risks are outweighed by the benefits expected from granting that discretion. See, e.g., Cass, Auer *Deference*, *supra* at 567–80; Nielson, *Beyond*, *supra* at 989–1000; Walker, *Review*, *supra* at 1007–10. Unlike *Auer*, the deference appropriate on this view is not a *general* deference to interpretation of ambiguous rules, rooted in the rule ambiguity itself, but deference to *a particular exercise of discretion committed by law*.

The exact showing that is required to demonstrate that commitment need not be encapsulated in a single test. There are sound reasons for requiring relatively explicit commitment of discretion in some cases, see, e.g., *King v. Burwell*, 135 S.Ct. at 2488–89; *American Trucking Associations*, 531 U.S. at 468–71; *Brown & Williamson*, 529 U.S. at 159–60; *MCI Telecommunications*, 512 U.S. at 231, and in other instances for permitting that commitment to be inferred from the nature of the authority granted to an agency and the broader statutory structure setting the terms of that authority, see, e.g., *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. at 981, 989; *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. 830–35. At a minimum, however, similar evidence of legislative commitment of discretionary authority should be required for deference to the interpretation and application of rules as to agency authority to adopt them. That manifestly is not the rule announced in *Auer*.

We urge the Court to overrule *Auer*, to reject the test embraced in that case, and to limit deference associated with *Seminole Rock* to instances in which courts find that applicable law grants discretion to an agency over interpretation of the agency's regulation.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 31, 2019

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